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IN THE

SUPREME COURT
OF THE
UNITED STATES
OCTOBER TERM, 1921.

OSAKA SHOSEN KAISHA, a Corporation, and UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation,

Petitioners,

VS.

PACIFIC EXPORT LUMBER COMPANY, a Corporation,

Respondent.

No. 129

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS REPLY BRIEF

Petitioners, in their original brief, have anticipated nearly all the points and authorities advanced and cited by respondent. We shall, however, add a few words in reply.

CLAIM OF GENERAL ADMIRALTY LIEN

On pages 2 and 3 of its brief, respondent questions the findings of the District Court and of the

Circuit Court of Appeals that the "lumber" the "Saigon Maru" refused to carry had not been sawed —had no physical existence—and asks that the evidence in support of this finding be pointed out.

On pages 436 and 437 of the Apostles, appears part of the cross-examination of Mr. Wheelwright, respondent's general manager, as follows:

"Q. This Inman-Poulsen Lumber Company is the concern that cuts your lumber for you? A. We buy of them and also of other mills. They furnished that particular cargo.

Q. I mean this cargo you bought of them? A. Yes.

Q. They cut it? A. Yes.

* * * * * * * *

Q. Well, what part were they going to cut for this ship, that the ship didn't take? A. What part?

Q. Yes. Would they cut right up to the last? A. Well, when the ship approaches completion, they look out and cut what she requires.

Q. That would be the long pieces then? A. *Well, I guess they thought the way we did, that if she fell short on her deck load, as the captain threatened to do from the start, that the long pieces would not go, so they did not cut them presumably.*"

And, further bearing on this point, Mr. Orrett, claimant's agent, wrote Mr. Wheelwright on May 23, 1917, about the time the "Saigon Maru" left Tacoma for Portland, as follows:

"My Dear Mr. Wheelwright:

"This will introduce to you Captain Y. Yano, who

represents this Company as Port Captain. I have instructed him to proceed to Portland with S. S. *Saigon Maru*, and to remain with the steamer as long as is necessary to superintend and help, so far as possible, with the loading. Captain Yano is fully advised as to my wishes, especially with regard to the amount of deck cargo to be carried.

"At the present time, the Captain of the steamer asks that only about 175,000 feet B. M. shall be loaded as deck cargo. This, I believe, would be too small a quantity, and I will leave it to you and the stevedores to try and convince Captain Yamamoto otherwise.

"Any attention that you are pleased to show Captain Yano, while at your port, will be highly appreciated by me." (Ap. 87-88.)

Three days afterward, upon the arrival of the *Saigon Maru* at Portland to take on cargo, Mr. Wheelwright addressed a letter under the date of May 26, 1917, to Captain Yamamoto, the master of the "Saigon Maru," from which we make the following excerpt:

"A large portion of the cargo is ready, but the balance will have to be sawed, and in order that we may suit the quantity to what the steamer is going to carry, we will thank you to inform us, after consulting the marine surveyor, of approximate quantity of proposed deck load." (Libelant's Exhibit "U," Ap. 1002-3.)

Authorities.

We have anticipated and considered on pages 40 to

52 of our original brief all of the cases cited on pages 8 to 18 of respondent's brief on the subject of its right to a lien under the general admiralty law, with the exception of *The Missouri*, 30 Fed. 384, *The Guilio*, 34 Fed. 909, and *The Margaretha*, 167 Fed. 794.

In the first of these cases, it was held that the libelant (shipper) had no lien against the ship because none of his goods had ever been placed in the ship's possession. In the second, there was an original libel and two or more cross-libels. The original libel was against 1940 Bales of Vegetable Hair. It does not appear, as to either of the cross-libels, whether it was *in rem* or *in personam*. However, the court held (p. 912) that "the evidence does not show that the bark did not take a full cargo." There was, therefore, no occasion to discuss further that feature of the case. In the third case, *The Margaretha*, there was a charter party under which nothing was done, and, quite naturally, the court held there was no lien.

So far as these cases are in point, they merely serve to support the position of the petitioners. In fact, none of the cases cited by respondent or the courts below give any support to the doctrine of part performance as contended for by respondent. It is only by extracting from the *obiter* parts of opinions rendered in cases in which liens against vessels have been *denied*, words and phrases which, at the very best, are ambiguous that any foundation can be furnished for respondent's doctrine.

Counsel contends, however, that there is really no "lack of reciprocity" in this case—that the charter party provides that "the vessel is to have a lien on cargo for all freight, dead freight and demurrage."

We submit that the quoted clause provides for a lien only upon lumber actually placed in the ship's possession and, such being the case, it is difficult to see how there is established by this clause a reciprocal right of lien as between the vessel and the unshipped, unsawn "lumber," which is the only lumber to which this suit relates.

MEASURE OF DAMAGES

We have shown on pages 94-95 of our original brief that, under the general rule, the measure of damages in cases of this kind is the difference between the market value of the goods at the place of destination at the time when by the contract they should have arrived there, minus their value at the place of shipment at said time, with the agreed freight and other expenses necessary to get the goods to destination added, and that the alleged liability to Gillanders, Arbuthnot & Company is not a recoverable item of damage on the ground that it is too remote, speculative and contingent and not within the contemplation of the parties at the time the charter party contract was made. In support of this contention we have cited the decision of this Honorable Court in the case of

Globe Refining Company vs. Landa Cotton Oil Company, 190 U. S. 540; 47 L. Ed. (U. S.) p. 1174, first column.

In that case, a sale contract was involved, but the court based its decision principally upon three English cases, in each of which the relation of the parties was that of shipper and carrier. The rule declared by this court was as follows:

"It may be said with safety that mere notice to a seller of some interest or probable action of the buyer is not enough, necessarily and as a matter of law, to charge the seller with special damages on that account if he fails to deliver the goods."

From one of these English cases cited by this Honorable Court we excerpt the following:

"There must, if it be sought to charge the carrier with consequences so onerous, be distinct evidence that he had notice of the facts and assented to accept the contract upon those terms."

Horne vs. Midland R. Co., L. R. 7 C. P. 583

Counsel and the courts below have refrained from applying to this feature of the case the rule of damages declared by the courts of the United States, apparently preferring the doctrine of the English case of *Strom Bruks Aktie Bolag vs. The Hutchison*, Aspinwalls' Reports, Vol. 10, N. S., pp. 136, 140-141.

That case came on appeal to the House of Lords from one of the divisions of the Court of Session of Scotland. There were two opinions,—one by Lord Macnaghten and the other by Lord Davy. The shipowner in that case had contracted to transport the goods in question from Stackna, Sweden, to Cardiff, and the shipper had contracted to sell the goods to a third party. The goods not arriving in time, the

purchaser of them bought against his contract with the shipper and claimed on the shipper for the difference between what he had to pay for the other goods and the contract price. The shipper paid the claim and, in turn, billed on the shipowner for the amount. This not being paid, the shipper sued the shipowner.

While there are some remarks in each of the two opinions which lend support to the claim that the court held that the shipper's liability under the sale contract was a proper item of damages in a suit against the shipowner, yet a careful reading of the two opinions discloses the fact that both adopted the general rule for the measurement of damages for which we are here contending. Lord Macnaghten quoted and approved the following rule:

"Setting aside all special damages, the natural and fair measure of damages is the value of the goods at the place and time at which they ought to have been delivered to the owner."

And he then said:

"The appellants' claim is made on that footing. All they want is to be protected against loss. They claim for the *extra cost of supply at the stipulated time and at the agreed place of delivery*, goods as nearly as possible of the same description as those which the respondents had undertaken to deliver. The appellants * * do not claim profits."

Lord Macnaghten also said:

"There seems to have been no market for the wood pulp at Cardiff,"

and the shipper was compelled to purchase in Manchester, Liverpool and London.

Adverting to the fact that no other transportation was available at the time, he further said that, if such transportation had been available, the measure of damages would have been merely the difference between the contract freight and the freight actually paid.

Lord Davy, in course of his opinion, says:

"I am of the opinion that the proper measure of damages would have been the *cost of replacing the goods* at their place of destination at the time when they ought to have arrived, less the value of the goods in Sweden and the amount of the freight and insurance. There was evidence that it was practically impossible to obtain another vessel to take the goods from Stackna at that time of the year, and I think, therefore, that appellants were justified in buying in or (which is the same thing for the purpose) allowing their purchasers to buy in as soon as it was apparent * * * that respondents could not perform their contract. And I think that the actual purchases made might properly be taken as *evidence of the cost of replacing* the goods in Cardiff."

From the foregoing it is plainly apparent that the amount of the liability of the shipper to his purchaser was employed only as a means of measuring the damages—only as the best *evidence* before the court of the amount required to replace the goods at the time and place agreed for their delivery.

In that case, there is a discussion of the question of what are general and what are special damages, and a statement to the effect that, in suits upon contract, there is no such thing as "special damages." Possibly, this is good British doctrine, but it is not the doctrine of this court, as is shown in the case of the *Globe Refining Co. vs. Landa Cotton Oil Co., supra,* where this court uses the term "special damages" with reference to an action upon contract.

The fact that the three English cases cited and approved in the above case of *Globe Refining Co. vs. Landa Cotton Oil Co.* declare a rule which is directly opposed to the doctrine of the *Strom Bruks* case as construed by counsel indicates very strongly that his construction is erroneous.

While the *general* rule for the measurement of a shipper's damage in case of the shipowner's refusal to carry as agreed is as above indicated and as stated on page 94 of our original brief, it is not to be overlooked that the lumber in question had been sold at destination *below* the market price prevailing there at the time of the ship's arrival. Such being the case, the rule stated by us on page 97 of said brief applies and such sale price becomes the minuend to be employed in ascertaining the damages.

The most serious objection, however, to the Court's method of measuring the damages is not in the minuend, but in the subtrahend employed—in calculating the damages on the basis of the March purchase price

instead of the August market price. (Petitioners Brief, pp. 91-2.)

Respectfully submitted,

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